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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 84

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

PELHAM G. WODEHOUSE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 14-28) is reported at 8 T.C. 637, and the opinion of the Court of Appeals (R. 90-98) is reported at 166 F. 2d 986.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1948. (R. 98-99.) The petition for a writ of certiorari was filed June 9, 1948, and granted October 11, 1948. The jurisdiction of this Court rests upon 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

Whether payments made by publishers in the taxable years 1938 and 1941 for the serial rights in the United States and Canada, and in one instance for the book rights, to literary works of taxpayer, a nonresident alien, constitute taxable gross income within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Treasury Regulations are set forth in the Appendix, *infra*, pp. 61-69.

STATEMENT

The facts found by the Tax Court material to the question presented are as follows:

The taxpayer, Mr. P. G. Wodehouse, is a British subject who formerly resided in France. During the taxable years 1938 and 1941 he was a nonresident alien. As a prolific and well-known writer of serials, plays, short stories, and other literary works, he has a wide reputation in the United States, and his works were accepted and published by various magazines. He sold his writings in the United States through one or more literary agents. (R. 15-16.)

On February 22, 1938, the Curtis Publishing Company (hereinafter referred to as "Curtis")

[1] If the decision below is reversed on this question, two other issues remain open for decision by the court below. (See fn. 7 and 8, *infra*, pp. 6-7.)

accepted for publication in the Saturday Evening Post an unpublished novel written by taxpayer entitled "The Cow-Creamer" (or "The Silver Cow") submitted to it by the Reynolds Agency, taxpayer's literary agent,[2] and sent its check for $40,000 to the agent on that date. (R. 18.) The memorandum of acceptance provided in part as follows (R. 18-19):

> This check is offered and accepted with the understanding that The Curtis Publishing Company buys all rights in and of all stories and special articles appearing in its publications and with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.
>
> MOTION-PICTURE RIGHTS
>
> Please note that our reservation of serial rights (which includes publication in one installment) includes new story versions based on motion-picture or dramatic scenarios of short stories and serials that have appeared in Curtis publications, and that we permit the use of such versions only under the following conditions: * * * When selling motion-

[2] Paul R. Reynolds, a member of the Reynolds Agency, testified that the firm had been agents for taxpayer since approximately the First World War (R. 37.)

picture or dramatic rights of matter, you must notify the producer to this effect, so that there may be no misunderstanding on his part and no infringement of our rights.

The book publication rights to "The Cow-Creamer" were sold for $5,000 to another publisher, Doubleday, Doran and Company. (R. 19.)

On December 13, 1938, Curtis accepted taxpayer's novel "Uncle Fred in the Springtime," subject to the same agreement of reassignment of rights as was contained in its acceptance of "The Cow-Creamer," and paid $40,000 therefor to the Reynolds Agency. Both novels were published serially by Curtis in the Saturday Evening Post during 1939. (R. 19-20.)

On July 23, 1941, the Reynolds Agency sold to Hearst's International-Cosmopolitan Magazine (hereinafter called "Hearst's") for $2,000 all the American and Canadian serial rights to an article entitled "My Years Behind Barbed Wire," written by taxpayer.[3] (R. 25.)

On August 12, 1941, the Reynolds Agency sold to Curtis for $40,000 all the North American (including Canadian) serial rights to "Money in the Bank," a novel written by taxpayer.[4] (R. 25.)

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[3] The agreement with Hearst's was stated in terms of a purchase by Hearst's of the serial rights (R. 79-80) rather than, as in the case of the transactions with Curtis, a transfer of all rights subject to reassignment of all rights other than the serial rights.

[4] Curtis' letter transmitting its check contained the same arrangement for reassignment of all rights except serial rights as in the case of "The Cow-Creamer." (R. 81-82.)

The Reynolds Agency, as withholding agent, withheld from and paid the income tax on each of the lump sum payments received from the publishers and the payments were treated as taxable income by taxpayer and his wife, the wife having reported one-half of the 1938 payments by the publishers as her income under an assignment to her by taxpayer of one-half of his interest in "The Cow-Creamer" and "Uncle Fred in the Springtime."[5] After the Commissioner determined deficiencies in taxpay-

[5] As to the Tax Court's treatment of the payments as income, see R. 6, 8, 18, and 21-23.

In connection with the withholding of tax on the 1938 and 1941 payments, the Tax Court specifically found that, in accordance with taxpayer's assignments to his wife (R. 18), the Reynolds Agency remitted to taxpayer and his wife each the sum of $17,100 after deducting commissions and taxes from the $40,000 received from "The Cow-Creamer" and similarly sent taxpayer and his wife each $17,000 to cover the proceeds of $40,000, less charges, from "Uncle Fred in the Springtime" (R. 19). While the Tax Court did not mention the payment of income tax on the $5,000 received by the Reynolds Agency from Doubleday, Doran and Company for the book publishing rights to "The Cow-Creamer" nor the payment of income tax on the total of $42,000 received in 1941 from the two publishers, Hearst's and Curtis, for the serial rights to "My Years Behind Barbed Wire" and "Money in the Bank," the record shows that the Reynolds Agency also withheld and paid the income tax on such proceeds. Paul R. Reynolds, a member of the firm, testified as follows in answer to a question as to the arrangement for handling the funds received from the Saturday Evening Post, the Curtis publication (R. 36):

> We collected the money, took our commission, retained any other charges, *withheld the non-resident alien income tax* and paid the proceeds to Mr. Wodehouse or to Mr. and Mrs., if the story was assigned to Mrs. [Italics supplied.]

The Commissioner's deficiency determinations also show that income tax had been withheld at source and paid in 1938 and 1941. (See R. 7, 9.)

er's income tax for years including 1938 and 1941, taxpayer filed a petition in the Tax Court which not only questioned the correctness of the bases of the Commissioner's deficiency determinations,[6] but sought refunds for overpayment of income tax (R. 14-15) on the ground that the payments received from the publishers through the Reynolds Agency were not subject to tax (R. 2).

The Tax Court held that the $85,000 paid by Curtis and Doubleday, Doran and Company in 1938 for serial and book rights, respectively, to taxpayer's novels and the $42,000 paid by Curtis and Hearst's in 1941 for serial rights represented advance royalties and that, as such, they were taxable as "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code. (R. 26.) The other issues in the case were also decided against taxpayer except as to his right to a deduction for attorneys' fees.[7]

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[6] The Commissioner's deficiency determination for 1938 was based on a determination that $40,250 (one-half of the gross proceeds from "The Cow-Creamer" and "Uncle Fred in the Springtime"), reported as income of taxpayer's wife, constituted taxable income to taxpayer. (R. 6.) For the year 1941 the Commissioner's deficiency determination was based on an increase in taxpayer's income from Doubleday, Doran and Company and on the disallowance of a deduction for attorneys' fees and of an exclusion from income of an amount treated by taxpayer as allocable to royalties earned outside the United States. (R. 8.)

[7] The Tax Court held that the anticipatory assignments by taxpayer to his wife of a one-half interest in the two novels "The Cow-Creamer" and "Uncle Fred in the Springtime"

On appeal the Court of Appeals for the Fourth Circuit reversed the decision of the Tax Court on the main issue as to the taxability of the payments under Section 211 (a) (1) and did not decide the other issues.[8] Judge Dobie dissented on the ground that the decision of the Tax Court should be affirmed on the authority and reasoning of *Rohmer* v. *Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862. (R. 90-98.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the payments made by publishers to taxpayer's United States literary agent in the taxable years 1938 and 1941 were and are to be treated as the proceeds from the sale of personal property and in failing to hold that the payments were and should be treated as advance royalties.

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were not the result of a real donative intent and lacked reality and that therefore the payments made to taxpayer's wife in 1938 under the assignments were income of taxpayer; that, since the inclusion in taxpayer's income of the amounts paid to his wife concededly increased his income above the statutory 25 percent, the statute of limitations did not bar the assessment of an additional tax against taxpayer for 1938; and that no part of the payments made in 1938 and 1941 by the publishers constituted income from sources outside the United States so as to be excludible from taxpayer's gross income in those years. (R. 21-23, 26-27.)

[8] In the Court of Appeals taxpayer contended in the alternative that his assignments to his wife were effective to transfer to his wife one-half of the 1938 tax liability on the payments made by the publishers in 1938 and that at least 6 percent of the payments for both 1938 and 1941 should be excluded from his gross income as being allocable to sources outside of the United States. The Court of Appeals found it unnecessary to decide those issues in view of its holding that the 1938 and 1941 payments were not taxable at all. (R. 98.)

2. In holding that the payments were not "other fixed or determinable annual or periodical gains" within the meaning of Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code.

SUMMARY OF ARGUMENT

Taxpayer, a nonresident alien not engaged in trade or business in the United States, is taxable under Section 211 (a)(1) of the Revenue Act of 1938 and of the Internal Revenue Code on the amount received as "interest * * * dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, *or other fixed or determinable annual or periodical gains, profits, and income*". Contrary to the decision below, which is in direct conflict with *Rohmer* v. *Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U.S. 862, the italicized language covers lump sum royalties, and the payments made in 1938 and 1941 by United States publishers to taxpayer, through his United States literary agent, were lump sum royalties for the purposes of the statute.

1. Each payment made by the publishers was a lump sum royalty for a license. This necessarily follows from the fact that taxpayer, instead of granting his entire right, title and interest in each of the literary works involved and in the copyrights to be obtained on them, granted only the use of each literary work for a limited purpose—for magazine and newspaper publication (the serial

rights) and in one instance for book publication. Such a limited grant is a license and not a sale. While the grant of a limited right under a copyright may, in a broad sense, be characterized as a "sale", it is clear that it is not treated as such for the purposes of Section 211(a)(1).

In connection with the imposition and withholding of tax on the income of nonresident aliens, Section 119 of the Revenue Act of 1938 and of the Internal Revenue Code, which contains the same provisions as those for years contained in previous Revenue Acts, defines and classifies income from sources within the United States. The section separately covers gain from sales of property and "Rentals and royalties". The latter are covered by Section 119 (a)(4) and include rentals and royalties "for the use of or for the privilege of using in the United States * * * copyrights * * *". This language is sufficiently broad to cover not only payments for the use of copyrights *already* obtained by an author but payments made under arrangements, such as those with Curtis in the present case, for the use of the statutory copyright *to be* obtained by magazine publication. Moreover, Section 119 (a)(4) is not by its terms limited to royalties paid periodically. Thus, the Treasury Department ruled in 1933 that it covers lump sum payments for a limited right under a copyright, and in 1938 it was so held in

Sabatini v. *Commissioner*, 98 F. 2d 753 (C.C.A. 2d), which since then has consistently been followed with the exception of the decision below. The connection between the *Sabatini* decision involving Section 119 (a) (1) on the one hand and the identical coverage of Section 211 (a) (1) and the withholding provision on the other has been so apparent that tax on the payments made to taxpayer in the present case was withheld at the source in 1938 and 1941 by taxpayer's United States literary agent, as was tax on the payments involved in the *Rohmer* case. In addition, the legislative history of Section 211 (a) (1) shows that, in adopting the language of the withholding section as a definition of the income to be taxable after 1936 as to nonresident aliens not engaged in trade or business in this country, Congress did not intend to relieve such nonresident aliens of tax on "Rentals and royalties" as defined in Section 119 (a) (4).

2. The holding of the court below that the publishers' payments to taxpayer through his United States literary agent are not covered by Section 211 (a) (1), because being single sums they were not paid annually or periodically, violates established criteria of statutory interpretation. As this Court has stated, the intention of Congress is to be ascertained, not by taking a word or clause from its setting and viewing it apart, but by considering it in connection with its context, the general purposes

of the statute in which it is found, and the occasion and circumstances of its use.

The language of Section 211 (a)(1) itself shows that it is not limited in its coverage to payments which are made annually or periodically. The statute taxes the amount received from sources within the United States as interest, rent, compensation, etc., "or other fixed or determinable annual or periodical gains, profits, and income." Under the familiar rule of *ejusdem generis* the quoted general language means income of the same type as those categories of income specifically mentioned, and the statute thus defines the nature or type of income taxed, regardless of the manner of payment. The House and Senate reports in connection with the original enactment of Section 211 (a)(1), the language of which was adopted from the withholding at source provision which had been in effect as to nonresident aliens since 1917, not only so interpreted the statute but attached no significance to the words "annual or periodical" except as perhaps making it more clear that the statute did not cover gain from the sale of property, the general language of the statute quoted above being interpreted as meaning "other fixed and determinable income" and "other fixed and determinable income (not including capital gains)." It is also evident that as far back as 1917 and through all the intervening years Congress attached no importance to the words "annual or

periodical," for the information at source provision as to citizens has since 1917 covered the very same categories of income specifically mentioned in Section 211 (a)(1), with the exception of dividends added in 1936, and "other *fixed or determinable* gains, profits, and income" while at the same time, since 1917, the provision for withholding at source has covered the same specified categories of income and "other *fixed or determinable annual or periodical* gains, profits, and income." The two general phrases were used interchangeably in a legislative report in 1918 referring to the two statutes.

The court below was plainly in error in thinking that an interpretation of Section 211 (a)(1) in accordance with the legislative materials would amount to an excision of the words "annual or periodical". In adopting its own interpretation of the words "annual or periodical" as meaning "paid annually or periodically", the court below took the words "annual or periodical" from their context and failed to recognize that, since the whole phrase "fixed or determinable annual or periodical gains, profits, and income" is merely descriptive of the categories of income *specifically* listed, it is immaterial whether those categories of income are described as "fixed or determinable" income or as "fixed or determinable annual or periodical" income. It is still "other" income of the same type which is covered under the general phrase "other

fixed or determinable annual or periodical gains, profits, and income."

Section 211 (a)(1), properly construed, clearly covers lump sum royalties, including those involved in the present case. Congress plainly regarded the specified categories of income as being of the "fixed or determinable" type, exclusive of capital gains, and lump sum royalties are income of the quoted type, being wholly income when paid. Further, the legislative purpose in enacting the statute in 1936, as shown by the House and Senate reports, was, so far as pertinent here (aside from the collection of additional revenue), simply to relieve nonresident aliens not engaged in trade or business in this country of tax on capital gains which it had been found administratively impossible in most cases to collect effectually and, since Section 119 draws a distinction between "Rentals and royalties" and gain from the sale of property, Congress must have intended that nonresident aliens not engaged in trade or business in this country should remain taxable on "Rentals and royalties" as defined in Section 119 (a)(4), which includes the lump sum royalties received by taxpayer. Moreover, the reason for the exemption of tax on gain from the sale of property—the impossibility in most cases of collecting the tax effectually—is one which cannot be related to lump sum royalties for the use of a copyright, which are wholly income when paid and easily collectible

by withholding agents, as distinguished from the proceeds of the sale of property, where the tax is laid only on the gain, and the amount of the gain is determinable in most cases only by an ascertainment and deduction of the adjusted cost or other basis of the property.

ARGUMENT

The amounts paid by publishers in 1938 and 1941 to taxpayer through his literary agent constitute taxable gross income under Section 211 (a) (1) of the Revenue Act of 1938 and of the Internal Revenue Code

During the taxable years 1938 and 1941 taxpayer was a non-resident alien individual not engaged in trade or business and not having an office or place of business in the United States and, accordingly, was required by Section 211 (a) (1) of the Revenue Act of 1938 (Appendix, *infra*, pp. 62-63) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 211) to pay income tax in those years[9] upon amounts received from sources within the United States as——

> interest * * *, dividends, rents, salaries, wages, premiums, annuities, compensations,

[9] The tax was at the flat rate of 10% for 1938 and 27½% for 1941 if the aggregate gross income, as defined in Section 211 (a) (1) from sources within the United States, was less than $21,600 for 1938 and $23,000 for 1941. If, however, the taxable income, as defined in Section 211 (a) (1) exceeded $21,600 for 1938 and $23,000 for 1941, such income was subject to the normal tax and surtax applicable to individuals generally, but in no case was the tax to be less than 10% of the 1938 gross taxable income and 27½% of the 1941 gross taxable income. Section 211 (a) (2) and (c) of the Revenue Act of 1938 (Appendix, *infra*, pp. 63-64) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 211).

remunerations, emoluments, *or other fixed or determinable annual or periodical gains, profits, and income*, * * *. [Italics supplied.]

This section was originally enacted in 1936, prior to which all nonresident aliens were subject to tax on all income from sources within the United States, and covers that income of a nonresident alien which under Section 143 (b) of the Revenue Act of 1938 (Appendix, *infra*, pp. 61-62) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 143), as well as (with the exception of some dividends prior to 1936) under the successive revenue laws both prior to and since the enactment of Section 211 (a)(1) in 1936, has been subject to withholding of the tax at source.[10] In interpreting the withholding tax section of the various Revenue Acts from 1924 to 1936 and both the withholding tax section and Section 211 (a)(1) from 1936 on, the pertinent Treasury Regulations,[11] like Articles 143-2 and 211-7 of Treasury Regulations 101 (see

[10] See footnote 18, *infra*, p. 29.

[11] Article 362 of Treasury Regulations 65, promulgated under the Revenue Act of 1924, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 762 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 143-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934; Articles 143-2 and 211-7(a) of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; Sections 19.143-2 and 19.211-7(a) of Treasury Regulations 103, promulgated under the Internal Revenue Code; Sections 29.143-2 and 29.211-7(a) of Treasury Regulations 111, promulgated under the Internal Revenue Code.

Appendix, *infra*, pp. 65, 67-69), promulgated under the Revenue Act of 1938, have provided that while the language of the statute specifically covers interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments, "other kinds of income are included, as, for instance, royalties". On the other hand, these Regulations state that—

> The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. * * *

The decision below, holding that the payments by publishers received by taxpayer in 1938 and 1941 through his literary agent are not taxable under Section 211 (a)(1), was based upon two grounds. The court first concluded that the payments by the publishers are exempt from taxation under the statute as constituting the proceeds from sales of personal property (R. 92-96) and then held, in addition, that the payments did not come within the terms of the statute because they did not answer the description of "annual or periodical" gains (R. 96-98), apparently because they were paid as single sums.

The Government's position is that the payments by the publishers constituted lump sum royalties for the purposes of the statute and that the statute, instead of covering only income which is paid annually or periodically, defines the nature

or type of income taxed, regardless of the manner of its payment, and covers lump sum royalties. This position is supported not only by *Rohmer v. Commissioner*, 153 F. 2d 61 (C.C.A. 2d), certiorari denied, 328 U. S. 862, with which the decision below is in direct conflict, but, we submit, by the full context of the statute, its legislative history, administrative practice and other prior decisions.

Indeed, until the rendition of the decision below it had appeared settled that nonresident aliens were taxable under Section 211(a)(1) on all income, regardless of its form, from transfers of less than whole interests in copyrights. Miller, *Taxation of Income from Literary Property Owned by Nonresident Aliens*, 54 Yale L. J. 879, 885 (1944-1945). Even before the decision of the Court of Appeals for the Second Circuit in *Rohmer v. Commissioner, supra*, which was decided in 1946 and rejected by the court below, Rohmer's literary agent had withheld the tax on the lump sum payments made in that case in 1940 for the serial rights to "The Island of Fu Manchu" and Rohmer and his wife had included the payments in their gross income. (See R. 14-15, No. 1451, October Term, 1945.) Similarly, in the present case the tax on the payments made in 1938 and 1941 by the publishers for the serial rights and in one instance for the book rights were also withheld by taxpayer's literary

agent and the payments included by taxpayer in his gross income (see Statement, *supra*, p. 5), the issue with respect to the includibility of the payments in gross income having been raised, as in the *Rohmer* case, by way of claim for refund after the Commissioner had determined deficiencies on other grounds.

A. For the Purposes of Section 211 (a)(1), the Agreements Between the Publishers and Taxpayer's Literary Agent were Licenses for the Limited Use of Taxpayer's Writings, Not Sales of Personal Property, and the Amounts Paid Therefor Lump Sum Royalties

The fact that the payments by publishers in 1938 and 1941 were single lump sums does not of course preclude them from being "royalties." *Rohmer* v. *Commissioner*, *supra*. A "royalty" is defined as a duty or compensation paid to the owner of a patent or a copyright for the use of it or the right to act under it, *usually* at a certain rate for each article manufactured, used, sold, or the like. 3 Bouvier's Law Dictionary (Rawle's Third Revision) 2975; Webster's International Dictionary. It is sometimes defined as a payment proportionate to the use of a patented device, *ordinarily* in specific sums paid annually or at other stated periods for the use of the device, whether it is used much or little. *Texsa Co.* v. *Holland Furnace Co.*, 73 F. 2d 553, 554 (C.C.A. 6th); *Western Union Tel. Co.* v. *American Bell*

Tel. Co., 125 Fed. 342, 348-349 (C.C.A. 1st). While a royalty is usually paid at a specified rate and periodically, a lump sum payment may also be a royalty if it is paid by a licensee to a licensor for the use of an article. *Rohmer* v. *Commissioner*, *supra*; *Sabatini* v. *Commissioner*, 98 F. 2d 753 (C.C.A. 2d); *Hazeltine Corp.* v. *Zenith Radio Corp.*, 109 F. 2d 10, 16-17 (C.C.A. 7th); *Ehrlich* v. *Higgins*, 52 F. Supp. 805 (S.D. N.Y.); *Estate of Marton* v. *Commissioner*, 47 B.T.A. 184; cf. *Berlin* v. *Commissioner*, 42 B.T.A. 668; *Kaltenbach* v. *United States*, 66 C. Cls. 581; *Browning Co.* v. *Commissioner*, 6 B.T.A. 914. As the Court of Appeals for the Tenth Circuit stated in *Commissioner* v. *affiliated Enterprises*, 123 F. 2d 665, 668:

> While payment ordinarily is at a certain rate for each article or certain per cent of the gross sale, that in itself is not determinative. *The purpose for which the payment is made and not the manner thereof is the determining factor.* [Italics supplied.]

With respect to the income of nonresident aliens, Congress has defined "Rentals and Royalties" in Section 119 (a)(4) of the Revenue Act of 1938 (Appendix, *infra*, p. 61) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 119), as well as in previous Revenue Acts (fn. 16, *infra*, p. 27), as—

> Rentals or royalties from property located in the United States or from any interest

> in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises, and other like property; * * *

and, as will be seen later, royalties according to that definition, even though paid in lump sums, were intended by Congress to be included within the coverage of Section 211(a)(1).

It is clear, and the court below did not hold to the contrary although taxpayer may take issue on the point, that the transactions involved here were not sales of all of taxpayer's interest and title in particular writings nor of the complete copyright interest, but were, instead, but grants to publishers of only the serial rights covered by a copyright [12] and in one instance of the book rights, despite the fact that the payments by Curtis, which constitute the bulk of the income involved here, were in each case forwarded to taxpayer's agent with a letter (R. 66, 73, 81) stating that the check in payment was offered and accepted with the understanding that Curtis buys "all rights in and of all stories and special articles appearing in its publications." This quoted language is broad but its effect depends upon the parties' intent (*Rossiter* v. *Vogel*, 134 F. 2d 908 (C.C.A. 2d)), and Curtis' letters not only

[12] The serial rights cover magazine and newspaper publication and exclude book, dramatic and moving picture rights. *New Fiction Pub. Co.* v. *Star Co.*, 220 Fed. 994 (S.D. N.Y.).

stated that the check in payment was offered and accepted. (R. 66, 73, 81)—

> with the further understanding that every number of these publications in which any portion thereof shall appear shall be copyrighted at its expense. After publication in a Curtis periodical is completed it agrees to reassign to the author on demand all rights, except American (including Canadian and South American) serial rights.

but also referred to Curtis' "reservation of serial rights" (R. 66, 73, 81) and assumed that taxpayer had the right to sell the motion picture and dramatic rights (R. 67, 74, 82). Obviously, therefore, the agreement as to each story contemplated the obtaining of the statutory copyright thereon by magazine publication with the proper notice of copyright. Copyrighting by such a procedure is authorized by the copyright statutes (Act of March 4, 1909, c. 320, 35 Stat. 1075, Secs. 3, 9 (17 U.S.C. 1946 ed., Secs. 3, 9)) and serves as a copyright of all component parts of the publication the same as if each story had been individually copyrighted. This copyrighting was intended to give Curtis only the serial rights under the copyright to be obtained by magazine publication. The agreements with Curtis were no different, except in form, from the agreement with Hearst's, in which it was stated that Hearst's was buying "all American and Canadian serial rights" (R. 79) and the agreement

with McFadden Publications involved in the *Rohmer* case, *supra*, where payment for "The Island of Fu Manchu" was made by a check containing an endorsement that the literary agent acknowledged full payment for the manuscript "with authority to copyright" and "With 1st and 2nd American and Canadian serial rights," Rohmer retaining the book, motion picture and stage production rights (see No. 1151, October Term, 1945, R. 13). Those agreements also contemplated copyrighting by publication and, as Paul R. Reynolds, taxpayer's literary agent, testified in connection with the copyrights to taxpayer's stories and reassignments by Curtis to taxpayer (R. 57), the assignments by Curtis to an author are in "a regular form" and "the custom in the magazine business is to universally re-assign the rights after the magazine has exercised them." [13] Therefore, regardless of the precise form of these various agreements, the substantive effect was a grant of only the serial rights and thus less than

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[13] Paul R. Reynolds, taxpayer's literary agent, testified that Curtis took out the copyrights on the three stories of taxpayer on which it received the serial rights (R. 57) and that he felt sure Curtis later assigned the copyrights to taxpayer (R. 58), but at one point he stated that after publication Curtis assigns to the author "all the rights except the rights they retain" (R. 56).

The present case also involves a grant by taxpayer of the book publishing rights to "The Cow-Creamer" to Doubleday, Doran and Company for $5,000, but the record does not contain the language of the agreement under which payment was made therefor. "The "Cow-Creamer" was one of the stories covered by an agreement with Curtis with respect to serial rights and was copyrighted by Curtis.

the entire bundle of rights to be obtained under the contemplated copyright by magazine publication. This is true whether the publisher became the copyright "proprietor", or held legal title to the copyright in trust for the author, and the court below apparently so assumed.[14]

Contrary to the decision below, the grant of serial rights or other limited rights under a copy-

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[14] The copyright statutes provide for copyrighting by the author or "proprietor" of a work. Act of March 4, 1909, *supra*, Sec. 8 (17 U.S.C. 1946 ed., Sec. 8.) It appears that a "proprietor" is only one who is an assignee of the *full* copyright privilege (*Houghton Mifflin Co.* v. *Stackpole Sons, Inc.*, 104 F. 2d 306 (C.C.A. 2d), certiorari denied, 308 U.S. 597; *Egner* v. *E. C. Schirmer Music Co.*, 139 F. 2d 398 (C.C.A. 1st), certiorari denied, 322 U.S. 730) but, on the other hand, it has been held that a copyright may be taken out by a publisher and the legal title held in trust for the author (*Cohan* v. *Richmond*, 86 F. 2d 680 (C.C.A. 2d); *Bisel* v. *Ladner*, 1 F. 2d 436 (C.C.A. 3d); cf. *Edward B. Marks Music Corp.* v. *Jerry Vogel Music Co.*, 140 F. 2d 266 (C.C.A. 2d); *Yardley* v. *Houghton Mifflin Co.*, 108 F. 2d 28 (C.C.A. 2d), certiorari denied, 309 U.S. 686; cf. *Ind. Wireless Co.* v. *Radio Corp.*, 269 U.S. 459, 469). In *Eliot* v. *Geare-Marston, Inc.*, 30 F. Supp. 301 (E.D. Pa.), which involved a grant of serial rights to the Curtis Publishing Company under an agreement evidently substantially similar in form to the agreement used by Curtis in the present case and where Curtis reassigned to the author all rights in the article except the American serial rights (but not the copyright generally), it was stated that Curtis was the copyright proprietor and that the author was the licensee of all rights except the serial rights reserved by the publisher. That statement was not necessary to decision, for both the author and publisher had joined in the suit, the damages sought were for infringement of the serial rights, and, as the court stated, the author was not entitled to recover damages for infringement of the serial rights, although the publisher was. This decision is one on which taxpayer has placed particular reliance in the present case, but in our view of the case no question is involved as to whether Curtis became and/or remained the copyright proprietor, as to the stories on which it received only the serial rights. Indeed, the court below did not hold to the contrary.

right results in a license, not a sale. A copyright in any form, statutory or common law, is a monopoly, consisting only in the power to prevent others from reproducing the copyright work (*RCA Mfg. Co.* v. *Whiteman*, 114 F. 2d 86, 88 (C.C.A. 2d), certiorari denied, 311 U. S. 712), a right distinct from the literary property itself. The copyright covers the right to prevent publication and reproduction in various forms, such as by magazine and newspaper publication (called the "serial rights"), book publication, dramatic production, and movie production. When one or more of those rights is transferred, the transferee receives the right to use the copyrighted work for a limited purpose and thus receives a license. Only in a broad sense can the transferor be said to have "sold" and the transferee to have "bought" a property right, for the property right is of something less than the whole and neither the transferee's title, whether legal or equitable, nor his right to sue for infringement is severable from the full copyright. The transferee therefore does not receive the general and absolute property right essential to a sale. Cf. *Waterman* v. *Mackenzie*, 138 U. S. 252, 255. Thus it had been held in numerous cases that the grant of a limited right under a copyright is a license and not a sale. See *Rokmer* v. *Commissioner, supra; Houghton Mifflin Co.* v. *Stackpole Sons, Inc.*, 104 F. 2d 306, 311 (C.C.A. 2), certiorari denied, 308 U. S. 597; *Sabatini* v. *Commissioner*,

98 F. 2d 753 (C.C.A. 2d); *Ehrlich* v. *Higgins*, 52 F. Supp. 805 (S.D. N.Y.); *Eliot* v. *Geare-Marston, Inc.*, 30 F. Supp. 301, 306 (E.D. Pa.); *M. Witmark & Sons* v. *Pastime Amusement Co.*, 298 Fed. 470 (E.D. S.C.), affirmed, 2 F. 2d 1020 (C.C.A. 4th); *New Fiction Pub. Co.* v. *Star Co.*, 220 Fed. 994 (S.D. N.Y.); *Empire City Amusement Co.* v. *Wilton*, 134 Fed. 132, 133 (D. Mass); *Estate of Marton* v. *Commissioner*, 47 B.T.A. 184; *Berlin* v. *Commissioner*, 42 B.T.A. 668.

This Court's decision in *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, lends support to those decisions. In that case an artist unequivocally transferred to another the right to copyright one of his paintings and the question was whether the picture was protected by the copyright which the transferee secured prior to the exhibition of the picture by the artist. Among other things, it was contended that the transferee was but a licensee of the artist and in answer to that contention this court stated (pp. 296-297):

> But we think the transfer in this case accomplished what it was evidently intended to do, a *complete* transfer of the property right of copyright existing in the picture. *There is no evidence of any intention on the part of Sadler* [the artist] *to retain any interest in this copyright after the sale to Werckmeister* [the transferee of the right to copyright]; * * * [Italics supplied.]

The implication is that only a license would have resulted had the artist retained an interest in the copyright to be obtained.

The court below, in holding that a "sale" results when an author grants to a publisher the right to use his story for a limited purpose, appears to rest more on the ground that the grant of a license may properly be called a "sale" than that the grant of the right to use the story for a limited purpose is not a "license."[15] At one point in its opinion the court recognized that the payments by publishers in the present case were "for a right or privilege" (R. 93), and the court's conclusion that the publisher's payments were the proceeds of sales was stated to be based "on the inherent nature of the transfer" (R. 95) which in turn rested on the court's conclusion that there is nothing inherent in the nature of a copyright "which renders impossible" separate sales of the several parts which comprise the whole (R. 93). Further, the court apparently attached significance to the fact that the grant of a limited right under a copyright "is generally recognized in the commercial exploitation of

[15] The rejection of the decisions holding that the grant of a limited right under a copyright is a license rather than a sale was based on the court's conclusion that the decisions stemmed from the theory of indivisibility of a copyright for the purpose of infringement suits only and that "the only ground for the indivisible theory, (that is, the inability of the assignee of a part of a copyright to sue for infringement), has been swept away" by the fact that "an exclusive licensee" may now join the owner of the copyright in an infringement suit. (R. 95.)

literary works as a sale" (R. 94), though the court had itself stated in *Whitehead v. Commissioner*, 148 F. 2d 718, 720 (C.C.A. 4th) that—

> Transactions, as to their nature, are judged by their legal attributes and juristic consequences, not by titles affixed thereto by individuals. * * *

Concededly, the grant of a license may in a loose sense be called a "sale" but that does not mean that the grant is actually a sale nor, more importantly, that it is to be treated as such for the purposes of Section 211 (.)(1).

In resolving the question whether the grant of a right to use a copyright for a limited purpose should be deemed a license, according to its true nature, or classified as a sale for the purposes of Section 211(a)(1), effect must be given to Section 119 of the Revenue Act of 1938 (Appendix, *infra*, p. 61) and of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 119), which the court below completely ignored. Section 119, now as prior to 1936,[16] when all nonresident aliens were taxable on *all* income from sources within the United States,[17] defines what constitutes income from sources within the United States. In that section are set forth certain categories of income such as interest,

[16] Section 217 of the Revenue Acts of 1921 (c. 136, 42 Stat. 227); 1924 (c. 234, 43 Stat. 253); and 1926 (c. 27, 44 Stat. 9); Section 119 of the Revenue Acts of 1928 (c. 852, 45 Stat. 791); 1934 (c. 277, 48 Stat. 680), and 1936 (c. 690, 49 Stat. 1648).

[17] See, e. g., Sections 119, 211-217 of the Revenue Act of 1934.

dividends (with some exceptions), compensation for personal services, gain from the sale of real property, *gain from the sale of personal property* the source of which depends to a large extent on the place of sale and in some cases can be partly from sources without and partly from sources within the United States (Sec. 119 (a)(6) and (e)), and (Sec. 119(a)(4)):

> (4) RENTALS AND ROYALTIES.—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties *for the use of or for the privilege of using in the United States*, patents, *copyrights*, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; * * * [Italics supplied.]

Royalties "for the use of or for the privilege of using in the United States * * * copyrights" plainly include not only payments for the use of or for the privilege of using literary works already copyrighted by the author but payments made under arrangements such as those with Curtis, where the use of particular stories by taxpayer was granted for only a limited purpose covered by a copyright but was effected under an arrangement which contemplated the simultaneous termination of the common law copyright and obtaining of the statutory copyright by publication. Moreover, Section 119(a)(4) allows for no distinction in the form

in which the use of a copyright is conferred nor in the result so far as legal title to the copyright is concerned, so long as the payment is made for the use of or for the privilege of using the copyright and is thus a royalty. Since the language of the withholding section (see Sec. 143 (b), Appendix, *infra*, pp. 61-62), both before and after 1936,[18] and the identical language of Section 211 (a)(1) since its enactment in 1936 specifically includes "rent", and the pertinent Treasury Regulations have long provided that royalties are included under the statutory language "other fixed or determinable annual or periodical gains, profits, and income," the obvious and necessary conclusion is that "Rentals and royalties" as defined in Section 119 (a)(4) for the general purpose of classifying the income of a nonresident alien from sources within the United States must be similarly treated as rentals and royalties, not as the proceeds from the sale of personal property, for the more specific purposes of determining what income is subject to withholding as to all nonresident aliens and taxable under Section 211 (a)(1) as to nonresident aliens not engaged in trade or business in the United States. Article 211-7 (a) of Treasury Regulations

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[18] Section 221 (a) of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057), 1921, 1924, 1926; Section 144 (b) of the Revenue Act of 1928; Section 143 (b) of the Revenue Acts of 1932 (c. 209, 47 Stat. 169), 1934, 1936 and 1938; Section 143 (b) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 143).

101 (Appendix, *infra*, pp. 68-69) so provides, in the following language:

> A nonresident alien individual within class (1) referred to in the preceding paragraph is liable to the tax upon the amount received from sources within the United States, *determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income.* * * * [Italics supplied.]

The language of Section 119 (a)(4) does not by its terms make any distinction as to the manner of payment for the use of or for the privilege of using a copyright and it has long been established that no such distinction is to be drawn. Thus, in interpreting the provision in 1933, the Treasury Department ruled that a lump sum payment for the first and second American and Canadian serial rights of an author's output of stories was a royalty and not a sale of property. I. T. 2735, XII-2 Cum. Bull. 131-135 (1933). Further, as the Court of Appeals for the Second Circuit stated in *Rohmer* v. *Commissioner*, *supra* (p. 63):

> In *Sabatini* v. *Commissioner*, 2 Cir., 98 F. 2d 753, we held that income, consisting of a lump sum payment, under a contract made in England for the transfer by a nonresident alien of the world-wide right to produce motion pictures for a limited period, was not derived from a sale of property in England but was taxable as royalties, paid in advance, for the

> use in the United States. The withholding provision was not involved. The tax on aliens at that time included a tax on the proceeds of a sale of personal property, but not if the property was produced without and sold without the United States; however, the tax, as noted above, also included a tax on "royalties for the use of ~~or~~ for the privilege of using in the United States. * * * copyrights, * * * and other like property." In the *Sabatini* case, we assumed that, because the contract was made in England, if the transaction was a "sale," it was not taxable; holding that it was not a sale, we held that the proceeds were taxable as royalties. * * *

The decision in *Sabatini* v. *Commissioner, supra,* rendered in 1938, has been consistently followed in all pertinent decisions relating to the taxation of nonresident aliens, with the exception of the decision in the present case by the court below. See *Rohmer* v. *Commissioner, supra; Ehrlich* v. *Higgins,* 52 F. Supp. 805 (S.D. N.Y.); *Estate of Marton* v. *Commissioner,* 47 B.T.A. 184; *Berlin* v. *Commissioner,* 42 B.T.A. 668. In accord is *Molnar* v. *Commissioner,* decided October 16, 1945 (1945 P-H T.C. Memorandum Decisions, par. 45,317), appealed and affirmed on another point, 156 F. 2d 924 (C. C. A. 2d).

Goldsmith v. *Commissioner,* 143 F. 2d 466 (C.C.A. 2d), certiorari denied, 323 U. S. 774, which appears to be the only decision other than

the decision below unequivocally holding that a grant of limited rights under a copyright may be classified as a "sale," actually recognizes that such a grant is a "license" and is in no way inconsistent with the view that *for the purposes of Section 211 (a)(1)* payment therefor is to be treated as a royalty.[19] In the *Goldsmith* case, *supra*, the question was whether the payments received by a playwright for the assignment of the exclusive motion picture rights in a play were to be treated as ordinary income or as capital gains from the sale of capital assets within the meaning of Section 117 (a)(1) of the Revenue Act of 1938, c. 289, 52 Stat. 447, the playwright being a citizen of this country rather than a nonresident alien. Judge Chase, who wrote the main, but not the majority, opinion,

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[19] The court below seems to have thought that *General Aniline & Film Corp.* v. *Commissioner*, 139 F. 2d 759 (C.C.A. 2d), and *Commissioner* v. *Celanese Corp.*, 140 F. 2d 339 (App. D.C.), also support the view that the grant of limited rights under a copyright may be classified as a sale (see fn. 2, R. 93-94), but those decisions are plainly distinguishable. Both cases involved an assignment of patent rights. *General Aniline & Film Corp.* v. *Commissioner*, *supra*, decided by the Court of Appeals for the Second Circuit, was explained and distinguished by that court in its decision in the *Rohmer* case (p. 64), the decision which is on all fours with our position here. *Commissioner* v. *Celanese Corp.*, *supra*, which, like *General Aniline & Film Corp.* v. *Commissioner*, *supra*, involved the statute providing for withholding of tax from the income of nonresident aliens, turned on a holding that there had been a sale of the *entire* right, title and interest of the vendor in certain patents, the conditions attached to the sale being merely conditions subsequent which might have resulted in loss of the patents by the vendee. Significantly, Judge Dobie, who sat by assignment in that case, dissented from the decision below in the instant case.

held that the payments were not capital gains under Section 117 (a) (1) because the assignee of the motion picture rights was a licensee and the payments received by the taxpayer accordingly were royalties which were taxable as ordinary income. Judge Learned Hand, writing an opinion in which Judge Swan concurred, also held the payments taxable as ordinary income, but for another reason. He stated that the taxpayer was in business as a playwright, that an *exclusive license* is for most purposes treated as "property" and that he thought it was "property" within Section 117 (a) (1) and its grant a "sale," and that the payments received therefor were ordinary income because they came within the exclusion in the definition of capital assets of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." Judge Hand reasoned that the Congressional intent in excluding as capital transactions sales of property held primarily for sale to customers in the ordinary course of a taxpayer's business was to mass together and tax as a single source of ordinary income the proceeds of transactions which were "quite as though the taxpayer were giving his services for hire upon separate occasions" (p. 468) and thus concluded (p. 468):

> This being in my judgment what the section was aiming at, I see no reason to balk at the words used. It does not *unduly* strain the

meaning of "sale" *to make it include an exclusive license; * * **. [Italics supplied.]

At another point Judge Hand referred to the grantee of the motion picture rights as a "licensee" (p. 467). The opinion therefore recognized that the grant of the motion picture rights was a license and classified it as a "sale" only for the purpose of effectuating what was deemed to be the Congressional intent as to Section 117(a)(1), a different statute from the one involved in the present case.

Here, to "strain" the meaning of "sale" to include a license would frustrate rather than effectuate the Congressional intent, as will be seen, but the court below completely ignored that fact and indeed was apparently concerned only with the abstract question whether the grant of a limited right under a copyright may *ever* be called a "sale." The court even overlooked the real basis of the majority opinion in the *Goldsmith* case and assumed (fn. 2, R. 93-94) that the opinion was inconsistent with the holding of the same court in *Rohmer v. Commissioner, supra*, that the grant of a limited right under a copyright is a license and not a sale and the payment therefor a royalty for the purposes of Section 211 (a)(1). The Court of Appeals for the Second Circuit had itself stated in its decision in the *Rohmer* case, a decision by a unanimous court including Judge Swan who was one of the majority in the *Goldsmith* case, that (p. 65):

> And, because of the differing histories and purposes of Sec. 117 and Sec. 211 (a)(1)(A), respectively, we think that the views expressed by the majority in the *Goldsmith* case have no bearing here. It is well to remember that the concepts employed in construing one section of a statute are not necessarily pertinent when construing another with a distinguishable background.

Taxpayer will no doubt attempt to distinguish *Rohmer* v. *Commissioner, supra,* on the same theory urged below—that the decision was based on the ground that the taxpayer there retained copyright ownership whereas in the present case "title" passed. The distinction is without warrant. While the *Rohmer* decision did at one point refer to Rohmer as the copyright owner, the court was apparently using the term "copyright" in the common law sense as the author's bundle of rights in his literary manuscript, for the transcript of record in the case, which did not include any of the evidence before the Tax Court, did not show who was the statutory copyright owner nor any facts from which a conclusion in that connection might be drawn. The findings of the Tax Court simply reflected (5 T.C. 184) that Rohmer granted to McFadden Publications the American and Canadian serial rights, together with the radio rights, to "The Island of Fu Manchu" with authority to the publisher to copyright it. The story was presumably published and thus copyrighted, but the

findings did not show that it had been. Taxpayer's assumption that "title" passed in the present case is a legal conclusion based on the fact that in *Eliot v. Geare-Marston, Inc.*, 30 F. Supp. 301 (E.D. Pa.), which involved an apparently similar agreement with Curtis, it was stated that Curtis was the copyright owner. The present record does not show whether Curtis reassigned the copyright to taxpayer or just the rights other than serial rights (see fn. 13, *supra*, p. 22) but in any event taxpayer's interest in the copyright title was such that he could compel the joinder of Curtis in a suit for infringement. The latter fact was given considerable weight by the court below (R. 95), which failed, however, to recognize that its result was to remove any doubt that the payments by Curtis were royalties "for the use of or for the privilege of using in the United States * * * copyrights" within the meaning of Section 119 (a)(4) and were thus required to be treated as royalties for the purposes of Section 211 (a)(1).

B. *The Phrase "other fixed or determinable annual or periodical gains, profits, and income" Contained in Section 211 (a)(1) Defines the Nature or Type of Income Taxed and Includes Lump Sum Royalties*

The second ground for the decision below requires consideration of the proper interpretation

of Section 211 (a) (1), under which, as previously stated, taxpayer is taxable upon—

> the amount received, * * * from sources within the United States as interest * * *, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, *or other fixed or determinable annual or periodical gains, profits, and income*, * * *. [Italics supplied.]

The court below, while conceding that "it is reasonable to conclude that Congress intended Section 211 (a) (1) (A), as enacted in 1936, to include royalties" (R. 96), stated that the section "does not tax all payments or all royalties but only those which are 'fixed or determinable annual or periodical gains'" (R. 96) and held that the payments by publishers to taxpayer, through his United States literary agent, are not covered by the statute because the payments were made in single lump sums rather than annually or periodically (R. 95-96). The court rejected the interpretation placed on the statute by the Court of Appeals for the Second Circuit in the *Rohmer* case and stated that the language "other fixed or determinable annual or periodical gains, profits, and income" cannot be deemed "descriptive of the nature or type of income regardless of the actual manner of payment" without excising the words "annual or periodical" from the statute. (R. 96-97.) Then, after so holding, the

court stated that it did not mean that a lump sum payment is *never* subject to taxation under the statute. (See fn., R. 97.)

In holding for the purposes of this case that the statute covers only payments which are made annually or periodically and excludes lump sum payments, the court below adopted an arbitrary interpretation of the words "annual or periodical" and departed from established criteria for interpretation of statutes. As this Court stated in *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 93-94:

> The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. * * * The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection. We are not at liberty to reject the meaning so established and adopt another lying outside the intention of the legislature, simply because the latter would release the taxpayer or bear less

heavily against him. To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means.

When the language of Section 211 (a)(1) is interpreted in accordance with these criteria, the result, we submit, is a conclusion that the statute simply defines the type or nature of income taxed, irrespective of the manner of payment, and includes lump sum royalties, as the *Rohmer* decision held and as was implicit in the decisions in *Molnar* v. *Commissioner*, 156 F. 2d 924 (C.C.A., 2d); *Ehrlich* v. *Higgins*, 52 F. Supp. 805 (S.D. N.Y.); and *Estate of Marton* v. *Commissioner*, 47 B.T.A. 184.

The very language of Section 211(a)(1) shows that the coverage of the statute is not limited to amounts which are paid annually or periodically. The section does not state that it covers interest, dividends, rents, compensation, etc., and other fixed or determinable income "which is paid annually or periodically"; it imposes tax upon the amount received as interest, dividends, rents, compensation, etc., "or other fixed or determinable annual or periodical gains, profits, and income." The words "annual or periodical" must be considered in their context, and under the familiar rule of *ejusdem generis* the general phrase "other fixed or determinable annual or periodical gains, profits, and income" must be assimilated to the particular words "interest,

* * * dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments" and restricted to income of the same type unless the legislative intent requires an even broader interpretation and the language used is susceptible of that interpretation. See *Helvering v. Stockholms &c. Bank, supra,* pp. 88-89. The categories of income which are specifically designated under the statute constitute what Congress deemed to be "fixed or determinable annual or periodical" income and the phrase "*other* fixed or determinable annual or periodical gains, profits, and income" (italics supplied) means other income of like nature. Most of the categories of income specifically designated are ordinarily paid annually or periodically but all of them, with the possible exception of annuities and dividends (but cf. *De Nobili Cigar Co. v. Commissioner,* 143 F. 2d 436 (C.C.A. 2d)), are susceptible of lump sum payment. Since they are specifically made taxable, it can hardly be assumed that they are not taxable if paid in a lump sum.

Thus, in *Commissioner v. Raphael,* 133 F. 2d 442 (C.C.A. 9th), certiorari denied, 320 U. S. 735, which involved the taxability to a nonresident alien of a lump sum of $398,079.71 for interest included in a judgment for the fraudulent sale of land, the taxpayer's contention that the interest was not periodical income was, rejected,

the court stating that the statute specifically applies to periodical gain as distinguished from periodical income and that "because the interest gain is not *payable* periodically makes it nonetheless interest income when paid" (p. 445). A similar conclusion was implicit in *De Nobiki Cigar Co.* v. *Commissioner, supra,* where it was held that distributions to nonresident alien stockholders in redemption of preferred stock constituted dividends under Sections 115 (b) of the Revenue Acts of 1936 and 1938 and thus were taxable under Section 211 (a) and subject to withholding under Section 143 (b).

The court below seems to have thought that the pertinent Treasury Regulations interpret Section 211 (a)(1) as covering only income which is paid annually or periodically because the Regulations state that "Only fixed or determinable annual or periodical income" is subject to withholding under Section 143 (b) and taxable under Section 211 (a)(1). (R. 96.) That quoted phrase, however, is in the language of the statute and not an interpretation of it. In so far as the Regulations reflect an interpretation of the statutory language, they are not illuminating except to the extent that they have unequivocally stated for years that the statute covers royalties and does not cover gain from the sale of real or personal property. Article 211-7(a) of Treasury Regulations 101, promulgated under the Revenue

Act of 1938 (Appendix, *infra*, pp. 68-69), like the Regulations promulgated under the 1936 Act and under the Internal Revenue Code with respect to Section 211 (a)(1),[20] contains the following statement indicating the application of the rule of *ejusdem generis*:

> *Specific items of fixed or determinable annual or periodical income* are enumerated in the Act as interest * * *, dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but *other fixed or determinable annual or periodical gains, profits, and income* are also subject to the tax, as, for instance, royalties. * * * [Italics supplied.]

and then refers to the Regulations promulgated with respect to Section 143(b), the withholding provision, for a determination of fixed or determinable annual or periodical income. The Regulations under the withholding provision (see, e.g., Article 143-2 of Treasury Regulations 101, Appendix, *infra*, pp. 65-66) have since 1918 provided that [21]—

> The income need not be paid annually if it is paid periodically; that is to say, from

[20] Article 211-7(a) of Treasury Regulations 94; Section 19.211-7(a) of Treasury Regulations 103.

[21] See Article 362 of Treasury Regulations 45 and 62, promulgated under the Revenue Acts of 1918 and 1921, respectively, and provisions of Treasury Regulations cited in fn. 11, *supra*, p. 15.

> time to time, whether or not at regular intervals. * * *

which would indicate an interpretation of the statute as covering only income which is actually paid annually or periodically, but the same Regulations immediately follow with this statement:

> That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. * * *

thus reflecting that periodic payment is not in fact necessary, the length of time during which payments are to be made being reducible to one single lump sum payment. The Regulations promulgated with respect to the 1936 and 1938 Revenue Acts[22] further provided that—

> The share of the income of an estate or trust from sources within the United States which is distributable, *whether distributed or not*, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143(b). * * * [Italics supplied.]

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[22] Article 143-2 of Treasury Regulations 94 and 101.

More pertinently, Article 143-3 of Treasury Regulations 101 (Appendix, *infra*, p. 67), which is identical to a provision contained in other Regulations promulgated since 1936,[23] provides that, by virtue of a tax convention with France—

> *The following items of fixed or determinable annual or periodical income* from sources within the United States received by a citizen of France residing in France, or a corporation organized under the laws of France, are not subject to the withholding provisions of the Revenue Act of 1938 * * *:
>
> (1) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade-marks, and other analogous rights;
>
> (2) Income received as copyright royalties; and
>
> * * * *
>
> [Italics supplied.]

This provision of the Regulations therefore treats such amounts as "fixed or determinable annual or periodical" income within the meaning of the withholding provision and thus of Section 211 (a)(1). The provision draws no distinction between lump sum and periodical payment and the implication is that no such distinction is to be drawn, for

[23] Article 143-3 of Treasury Regulations 94; Section 19.143-3 of Treasury Regulations 103; and Section 29.143-3 of Treasury Regulations 111.

amounts paid as "consideration" for "the right to use patents, * * * and other analogous rights," which, under Section 119 (a) (4) includes copyrights, may manifestly consist of a lump sum. The Commissioner's interpretation of the Regulations is supported by all the relevant legislative materials. The Regulations should not, therefore, be construed so as to be inconsistent with the terms of the statute and with the manifest intent of Congress. To construe the Regulations as covering only payments made annually or periodically would be inconsistent with the legislative interpretation, as will be seen, and with the pertinent decisions with the exception of the decision below, as already shown, as well as with prior application of the statutory language, the Commissioner having determined a deficiency in income tax on lump sum royalties received in 1936 by a non-resident alien not engaged in trade or business in this country (see *Estate of Marton* v. *Commissioner, supra*) and tax on lump sum royalties paid nonresident aliens having been withheld at source by withholding agents in the present case and other cases (see *Estate of Marton* v. *Commissioner, supra*; *Ehrlich* v. *Higgins, supra*; *Rohmer* v. *Commissioner, supra*).

Another conceivable interpretation of the statute under the rule of *ejusdem generis*, which was not however urged in either the *Rohmer* case nor the present one but was intimated by the

court below (fn., R. 97), is that the language "fixed or determinable annual or periodical gains, profits, and income" covers gain which is periodical in relation to time, such as interest. Of the specific categories of income covered by the statute, which are the guides for determining what constitutes "fixed or determinable annual or periodical gains, profits, and income", all are of this type except compensation, remunerations and emoluments. Since these three are not, the statutory language cannot be interpreted as covering only income of that type and the legislative interpretation, as will be seen, is not so limited. It might be noted, however, that the lump sum royalties in the present case would be included under such an interpretation, for, since the renewal rights to the copyrights of taxpayer's literary works were vested by statute in taxpayer as the author (Act of March 4, 1909, *supra*, Sec. 23 (17 U.S.C. 1946 ed., Sec. 23); *Fisher Co.* v. *Witmark & Sons*, 318 U. S. 643) and he did not transfer the renewal right to the publishers as to any of the stories, the publishers' limited rights to use taxpayer's literary works were only for the copyright period of 28 years. The magazine publishers (but hardly the book publisher) might publish each story but once during the 28-year period, but the payment for the serial rights entitled them to publish during the entire period and if they did not do so the payment as to each story would not be unlike a lump sum paid as rent for a house which

the lessee lived in for but part of the period covered by the payment.

On the affirmative side, the relationship between Section 211 (a) (1) and Section 119 (a) (4), which is entitled "Rentals and royalties" and was discussed *supra*, pages 28-31, has long demonstrated that lump sum royalties are covered by the statutory language of Section 211 (a) (1). As previously shown, Section 119 defines income from sources within the United States for the general purpose of the taxation of nonresident aliens and gives separate treatment to gain from the sale of personal property and to rentals and royalties, the latter being covered by Section 119 (a) (4) and including royalties for the use of or for the privilege of using a copyright in the United States. Section 119 (a) (4) not only makes no distinction in the manner of the payment of the royalty but was held in *Sabatini v. Commissioner, supra,* a decision rendered in 1938, and was ruled by the Treasury Department in 1933 (I. T. 2735, *supra*), to include lump sum royalties for a limited use of a copyright in the United States. Since the language of Section 211 (a) (1) and of the identical withholding section specifically covers "rent" and the pertinent Treasury Regulations have long provided that the statutory language also covers royalties, the rentals and royalties covered by Section 119 (a) (4), which include lump sum payments, are necessarily taxable under Section 211 (a) (1) as to

nonresident aliens not engaged in trade or business in this country, such as taxpayer, and subject to withholding as to all nonresident aliens. This has apparently been clear to the literary agents who are withholding agents, since, as already noted, the tax on the lump sum royalties involved in the present case, paid in 1938 and 1941, and those in the *Rohmer* case, paid in 1940, was withheld at source under the withholding section. Moreover, both Rohmer and Wodehouse included the lump sum payments in their gross income under Section 211 (a)(1) and objected to their inclusion only after the Commissioner determined deficiencies in their income tax on other grounds.

The House and Senate reports on Section 211 (a)(1) reflect a legislative purpose and interpretation of the statutory language which support the view that the statute covers lump sum royalties. The Ways and Means Committee report [24] stated:

> In section 211, it is proposed that the tax on a nonresident alien not engaged in a trade or business in the United States and not having an office or place of business therein, shall be at the rate of 10 percent on his gross income from interest, dividends, rents, wages, and salaries *and other fixed and determinable income*. This tax (in the usual case) is collected at the source by withholding as provided for in section 143: *Such a nonresident will not be*

[24] H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9-10 (1939-1 Cum. Bull. (Part 2) 667, 673-674)

subject to the tax on capital gains, including gains from hedging transactions, as at present, it having been found impossible to effectually collect this latter tax. It is believed that this exemption from tax will result in additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. * * *

* * * In the case of a foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, it is proposed to levy a flat rate of tax 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, *and other fixed and determinable income (not including capital gains).* * * *

It is believed that the proposed revision of our system of taxing nonresident aliens and foreign corporations will be productive of substantial amounts of additional revenue, *since it replaces a theoretical system impractical of administration in a great number of cases.* [Italics supplied]

The Senate Finance Committee report [25] stated that the committee concurred in the main in the substantial changes made by the House bill in the present system of taxing nonresident aliens and foreign corporations and reiterated the above-quoted statements of the Ways and Means Com-

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[25] S. Rep. No. 2156, 74th Cong., 2d Sess., pp 21, 23 (1939-1 Cum. Bull. (Part 2) 678, 691-692).

mittee. No change has been made since 1936 in the law applicable to nonresident aliens.[26]

It thus clearly appears that Congress interpreted the language of the withholding section as covering income of the specified categories "and other fixed and determinable income" excluding capital gains and, with that interpretation in mind, adopted in Section 211 (a)(1) the language of the withholding section simply to relieve nonresident aliens not engaged in trade or business in this country of tax on capital gains, which it had been found administratively impossible to collect effectually. It is evident that Congress interpreted the language of the withholding section, and thus of Section 211 (a)(1), as being descriptive of the nature or type of income taxed, irrespective of the manner of payment. Further, the reports affirmatively reflect the Congressional interpretation of the statutory language "other fixed or determinable annual or periodical gains, profits, and income" by interpreting the phrase as covering "other fixed and determinable income" and at one point as "other fixed and determinable income (not including capital gains)." Apparently Congress viewed the words "annual or periodical" only as making it more evident that the statute does not cover gains from the sale of property, the words "an-

[26] Cf. Sections 119, 143 (b), and 211 of the Revenue Act of 1936 with the same sections of the Internal Revenue Code (26 U.S.C. 1946 ed., Secs. 119, 143, 211).

nual or periodical" actually not being necessary to such an exclusion.[27]

The interpretation which the House and Senate reports give the statutory language was no mere oversight, for there is evidence that for years Congress has attached no importance to the words "annual or periodical" contained in the statutory language adopted from the withholding provision. Prior to 1917 there was a withholding provision applicable to citizens and nonresidents alike.[28] Section 1211 of the Revenue Act of 1917, c. 63, 40 Stat. 300, provided for information at the source, in lieu of withholding at the source, as to citizens on—

> interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or *other fixed or determinable* gains, profits, and income. [Italics supplied.]

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[27] The pertinent Treasury Regulations have long provided (see Article 143-2 of Treasury Regulations 101, Appendix, *infra*, pp. 65-66) that—

> Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. * * *

Hence, the phrase "fixed and determinable income" refers to amounts which are wholly income when paid, which the proceeds of a sale of property might not be.

[28] Section IID of the Income Tax Act of 1913, c. 16, 38 Stat. 114, and Section 8(d) of the Revenue Act of 1916, c. 463, 39 Stat. 756.

At the same time, in Section 1205 of the 1917 Act the withholding provision was retained as to nonresident aliens, and covered—

> interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or *other fixed or determinable annual or periodical* gains, profits, and * * *

Despite the omission of the words "annual or periodical" from the information at source provision, the House report [29] in connection with the Revenue Act of 1918, which also omitted the words "annual or periodical" from its information at source provision (Section 256), stated that the 1917 Act had substituted information at source for collection at source "of any *fixed or determinable annual or periodical* sum" (italics supplied) in excess of $800. Aside from this affirmative reflection that the phrases "fixed or determinable" and "fixed or determinable annual or periodical" were used interchangeably, it is evident that the similarity of the language of the two sections was such as to have demanded an explanation if any additional significance was to be attached to the words "annual or periodical" contained in the withholding section. The 1917 provisions for information at source of the specified categories of income and "other *fixed or determinable* gains, profits, and income" (italics supplied) and for the withholding of the

[29] H. Rep. No. 767, 65th Cong., 2d Sess., p. 15. (1939-1 Cum. Bull. (Part 2) 86, 96).

tax at source as to nonresident aliens on the identical categories of income and "other *fixed or determinable annual or periodical* gains, profits, and income" have to the present day been retained in the various revenue statutes without change, except that the word "dividends" was added to the withholding provision in 1936[30] and in 1918 the words "compensation" and "remuneration" were changed from the singular to the plural.[31] Beginning in 1918, the Treasury Regulations with respect to the information at source provision[32] have successively stated, "Although to

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[30] Prior to 1936 the withholding at source section excepted income received as dividends from domestic corporations subject to tax. For example, Section 143(b) of the Revenue Act of 1934, *supra*, excepted "income received as dividends of the class allowed as a credit by section 25(a)" and Section 25(a), with certain exceptions, provided for a credit against normal tax of the amount received "as dividends from a domestic corporation which is subject to taxation under this title." The exception was removed from the withholding provision in 1936 and the word "dividends" added to the specified categories of income subject to withholding. Section 211(a)(1) conformed to the change. See Sections 143(b) and 211(a) of the Revenue Act of 1936, *supra*.

[31] For the provisions for information at source, see Section 256 of the Revenue Acts of 1918, 1921, 1924, 1926; Section 148(a) of the Revenue Act of 1928; Section 147(a) of the Revenue Acts of 1932, 1934, 1936, 1938 and the Internal Revenue Code.

For the provisions for withholding as to nonresident aliens, see Section 221(a) of the Revenue Acts of 1918, 1921, 1924, 1926; Section 144(b) of the Revenue Act of 1928; Section 143(b) of the Revenue Acts of 1932, 1934, 1936, 1938 and of the Internal Revenue Code.

[32] Article 1071 of Treasury Regulations 45, 62, 65, 69; Article 811 of Treasury Regulations 74 and 77; Article 147-1 of Treasury Regulations 86, 94, and 101; Section 19.147-1 of Treasury Regulations 103; Section 29.147-1 of Treasury Regulations 111.

make necessary a return of information the income must be fixed or determinable, it need not be annual or periodical," which was followed by a reference to the Regulations under the withholding provision, but reference to the Regulations under the withholding provision, which have also remained substantially the same throughout the years, has thrown little, if any, light on what the distinction was.

The statement of the court below that it knew of no authority "for the substitution of the language of a Committee Report for that of the statute to which it relates" (R. 98) merely further demonstrates the failure of the court below to recognize the applicability of the rule of *ejusdem generis*. Under that rule the phrases "other fixed or determinable" income and "other fixed or determinable annual or periodical" income are both to be taken as meaning other income of the same type as the specified categories of interest, rent, compensation, etc. The quoted phrases mean the same thing when applied to the same categories of income and the inquiry, in interpreting the statute, is not whether the words "annual or periodical" should be deleted, as the court below assumed, but whether the income sought to be taxed is income of a type corresponding to the specified categories of income. Since the specified categories are all fixed or determinable income and dissimilar to gain from the

sale of property, there can be no objection to an interpretation of the statutory language "other fixed or determinable annual or periodical gains, profits, and income" in accord with the legislative interpretation and intent. Certainly the court below was unwarranted in holding that, despite the express language of the statute and its legislative history, the words "annual or periodical" mean "paid annually or periodically"—an interpretation which, in addition to being in conflict with the legislative intent, would enable nonresident aliens not engaged in trade or business in the United States to avoid tax and render the statute largely nugatory by arranging for the lump sum payment, instead of periodic payment, of any income from sources within the United States.

Lump sum royalties are plainly covered by Section 211 (a)(1) as interpreted according to the rule of *ejusdem generis* and the corresponding legislative intent. Lump sum royalties constitute "fixed or determinable" income and are not gain from the sale of property except possibly in a very broad sense. That they are not to be treated as gain from the sale of property for the purposes of Section 211.(a)(1) is apparent from the relationship of Section 119 and the legislative purpose in enacting Section 211 (a)(1). The distinction between gain from the sale of property and royalties for the use of or for the privilege

of using copyrights in the United States was and still is drawn in Section 119, as we previously have shown, and hence Congress, in enacting Section 211 (a) (1) to relieve nonresident aliens not engaged in business in this country of tax on the sale of property, must have intended such nonresident aliens to remain taxable on "Rentals and royalties" as defined in Section 119 (a) (4). Moreover, the Congressional purpose in excluding capital gains because they had been found administratively impossible to collect effectually makes it clear that Congress had no thought of relieving nonresident aliens of tax on lump sum royalties as distinguished from periodic royalties. The determination of the amount of capital gain from a sale of property requires the ascertainment and deduction from the sale price of the adjusted cost or other basis of the property from the sale price; hence, the administrative difficulty in most cases in collecting the tax on such gains of a nonresident alien. The purpose to avoid this difficulty shows that what Congress intended to do was simply to make nonresident aliens taxable on amounts susceptible of collection of the tax thereon by withholding at source, that is, on amounts which are wholly income when paid. Royalties, whether paid all at one time in advance or in installments, are wholly income when paid and, as the Court of Appeals for the Second Circuit stated in the *Rohmer* decision (p. 64), "it is

not at all "impossible to effectively collect" a tax thereon."

The rejection by the court below of the legislative purpose in enacting Section 211 (a)(1) as expressed in the House and Senate reports (R. 97) was based upon an erroneous premise. The court thought that the tax on capital gains from the sale of real estate could be as easily ascertained and collected as the tax on lump sum royalties, which the court called "the gains from the sale of literary property" (R. 97), and therefore that to give effect to the legislative purpose would mean that, contrary to the pertinent Treasury Regulations, gain from the sale of real estate would also be includible under Section 211 (a)(1). It should hardly be necessary to state that as to a nonresident alien there is a vast difference between the collection of tax on lump sum royalties, which are wholly income when paid, and the collection of tax on gain from the sale of real estate, and of personal property also, where the amount of the gain must be determined by an ascertainment of the alien's adjusted cost or other basis and that basis deducted from the sale price.

The court below was also in error in stating (R. 95) that it could not suppose that Congress intended to tax the payments by publishers in the present case (which were for but a limited use of taxpayer's literary works) when a sale of taxpayer's entire right, title and interest in the manu-

scripts and copyrights to be obtained on them would not be taxable under the statute. The result as to complete sales, including the case where a nonresident alien author sells his literary work without retaining any interest in it or in the copyright to be obtained on it, is the necessary consequence of the legislative interpretation of the language of Section 211 (a) (1) and of the legislative purpose to relieve nonresident aliens of tax on capital gains. Congress could of course have continued to tax all nonresident aliens on gain from the sale of property. That it did not do so is no reason for concluding that payments for the use of or for the privilege of using a copyright in the United States are also exempt from tax, contrary to the distinction drawn in Section 119 between "Rentals and royalties" and the sale of property, for in enacting Section 211 (a) (1) Congress was motivated not by generosity but, so far as pertinent here, by the specific and limited purpose (aside from the production of additional revenue) of exempting nonresident aliens not engaged in trade or business in the United States of tax on a species of income which it had been found in most cases administratively impossible to collect. By the enactment of the statute Congress itself provided for the different treatment of gains from the sale of property and income received for the use of property, and that different treatment does not apply just to income received in connection with literary property. For example, assuming that

taxpayer owned a building in this country, the rent he received from it would be taxable under the statute, which specifically covers "rents," whereas the gain he received on a sale of the building would not be taxable.

On final analysis, the decision below is out of harmony with the language of Section 211 (a)(1); the legislative intent and purposes in enacting the statute; and the relevant decisions rendered since the enactment of the statute in 1936, which have all portended a construction of the statute as including the payments involved in the present case.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded to that court for decision on the remaining issues in the case.

Respectfully submitted,

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NOVEMBER, 1948.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * *

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—For gains, profits, and income from the sale of personal property, see subsection (e).

* * * *

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

* * * *

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the con-

trol, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country:

* * * *

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—There shall be levied, collected, and paid for each taxable year, in

lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country. For inclusion in computation of tax of amount specified in shareholder's consent, see section 28.

(2) *Aggregate more than $21,600.*—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than $21,600.

* * * *

(c) *No United States Business or Office and Gross Income of More Than $21,600.*—A nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein who has a gross income for any taxable year of more than $21,600 from the sources specified in subsection (a)(1), shall be taxable with-

out regard to the provisions of subsection (a)(1), except that—

(1) The gross income shall include only income from the sources specified in subsection (a)(1);

* * * * *

(3) The aggregate of the normal tax and surtax under sections 11 and 12 shall, in no case, be less than 10 per centum of the gross income from the sources specified in subsection (a)(1); and

* * * * *

SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

* * * * *

The corresponding sections of the Internal Revenue Code, which control the year 1941, are substantially the same, with the exceptions that the rate of withholding applicable to 1941, as specified in Section 143 (b) of the Code, as amended by Section 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and by Section 107 of the Revenue Act of 1941, c. 412, 55 Stat. 687, was 15% until September 29, 1941, and 27½% after that date; that the rate of tax on income of nonresident alien individuals received in 1941 specified in Section 211 (a)(1) of the Code, as amended by Section 105 of the Revenue Act of

1941, *supra*, was 27½%; that the aggregate amount of income specified in Section 211 (a) (2) and (c) of the Code, as amended by Section 105, Revenue Act of 1941, *supra*, was $23,000 for the year 1941; and that the percentage figure in Section 211 (c) (3) of the Code, as amended by Section 105 (c) of the Revenue Act of 1941, *supra*, applicable to 1941 was 27½%.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

> ART. 119-5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

* * * * *

> ART. 143-2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Act specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. But other

kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in accordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly received determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143 (b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

ART. 143-3. *Exemption from withholding.*—

* * *

* * * * *

The following items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France, or a corporation organized under the laws of France, are not subject to the withholding provisions of the Revenue Act of 1938, since such income is exempt from Federal income tax under the provisions of the tax convention between the United States and France, signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations):

(1) Amounts paid as consideration for the right to use patents, secret processes and formulas, trade-marks, and other analogous rights;

(2) Income received as copyright royalties; and

* * * * *

ART. 211-7. *Taxation of nonresident alien individuals.*—For the purposes of this article and articles 212-1, 213-1, 214-1; and 217-2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than $21,600 gross amount of

fixed or determinable annual or periodical income from sources within the United States; (2) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year and deriving in the taxable year more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; and (3) nonresident alien individuals who at any time during the taxable year are engaged in trade or business in the United States or have an office or place of business therein.

(a) *No United States business or office—General Rule.*—A nonresident alien individual within class (1) referred to in the preceding paragraph is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 211 (a), the term "amount received" means "gross income." Specific items of fixed or determinable annual or periodical income are enumerated in the Act as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to

the determination of fixed or determinable annual or periodical income, see article 143-2. The items of fixed or determinable annual or periodical income from sources within the United States received by a citizen of France residing in France which are exempt from Federal income taxation under the provisions of the tax convention between the United States and France signed April 27, 1932, and effective January 1, 1936 (see page 680 of the Appendix to these regulations), are described in article 143-3.

* * * * *

Sections 19.119-5, 19.143-2, 19.143-3 and 19.211-7 of Treasury Regulations 103, promulgated under the Internal Revenue Code, are substantially the same as the above. T.D. 5011, 1940-2 Cum. Bull. 18, and T.D. 5086, 1941-2 Cum. Bull. 38, conformed Regulations 103 to the provisions of the Revenue Acts of 1940 and 1941, *supra*, in respect of the withholding rates, rate of tax on gross income, and aggregate gross income, applicable to 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1943 613401